STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 10, 2004
v	No. 253261 Jackson Circuit Court
JAMES RICHARD LARGE, Defendant-Appellee.	LC No. 03-000895-FH

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant was charged with manslaughter with a motor vehicle, MCL 750.321; operating a vehicle under the influence of liquor (OUIL) causing death, MCL 257.625(4); OUIL second offense, MCL 257.625(1); and violation of license restrictions, MCL 257.312. The prosecution appeals by leave the circuit court order that denied its motion to reinstate the OUIL causing death count and granted defendant's motion to quash the manslaughter with a motor vehicle count.

Defendant's vehicle struck and killed the victim as she rode her bicycle into the roadway from her elevated and partially obscured driveway. The prosecution presented evidence that defendant was traveling between 60 and 65 miles per hour in a fifty-five miles per hour zone and that his blood alcohol content was .10. The prosecutor contends that the circuit court erred in finding that the district court abused its discretion in binding over defendant on the manslaughter with a motor vehicle count. We disagree.

This Court reviews a district court's decision to bind over a defendant for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000) (citations omitted). "A magistrate's ruling that alleged conduct falls within the scope of a criminal statute is a question of law reviewed for clear error." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997) (citations omitted).

An unlawful act committed in a grossly negligent manner that proximately causes death is involuntary manslaughter. *People v McCoy*, 223 Mich App 500, 502; 566 NW2d 667 (1997) (citations omitted). "To prove gross negligence amounting to involuntary manslaughter, the prosecution must establish: (1) defendant's knowledge of a situation requiring the use of ordinary care and diligence to avert injury to another, (2) [defendant's] ability to avoid the

resulting harm by ordinary care and diligence in the use of the means at hand, and (3) [defendant's] failure to use care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." *People v Albers*, 258 Mich App 578, 582; 672 NW2d 336 (2003), citing *McCoy*, *supra* at 503.

Although the circuit court concluded that the district court abused its discretion in binding over defendant on this count, the circuit court agreed with the district court's finding that defendant's conduct was grossly negligent. Defendant does not challenge the lower courts' conclusion that his conduct was grossly negligent. Instead, he contends that the district and circuit courts correctly found that the prosecution had not established causation, i.e., had not presented evidence that defendant had the ability to avoid the harm. The only testimony presented at the preliminary examination on this point indicated that by using ordinary care and diligence defendant did not have the ability to avoid the fatal accident. Deputy Bradley Piros, who was admitted as an expert in accident reconstruction, opined that the accident was inevitable even if defendant had been driving forty-five miles per hour. Piros explained how he had performed twelve tests involving the driveway in question and a similar bicycle to the one the victim was riding. Piros determined that the victim was traveling down the driveway at a speed of nine miles per hour and that the distance from the edge of the driveway to the area of impact was approximately thirteen feet. Piros was then asked:

> *Q.* And a person traveling at nine miles per hour from the edge of the driveway to the area of impact, how much time transpired from the time that Cody reached the edge of the road until the point she was struck by Mr. Large's truck?
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> * * *
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> *A.* Using the distance of approximately thirteen feet and the speed of nine miles per hour, which if you calculate it in feet per second would be a little over thirteen feet, so approximately one second.
>
> *Q.* So that calculation basically says from the time Cody reaches the edge of the road until the point she's hit, covering that, traversing that thirteen feet would take approximately a second.
>
> *A.* Correct.

When asked how long it would take a sober driver to perceive a threat on the roadway, Piros stated, "Normal perception time in order to see a threat, realize you have a threat and then decide what you're going to do is around a second a half." Thus, if defendant had been sober, he still would not have had time to react.

To bind the defendant over, the magistrate must always find that there is evidence regarding each element of the crime charged or evidence from which the elements may be inferred. *Hudson*, *supra* at 278 (citations omitted). In this case, there was no evidence demonstrating that defendant could have avoided the resulting harm by using ordinary care and diligence. Based on the above testimony, even if defendant had been sober and had been driving forty-five miles per hour, defendant could not have avoided the accident. Thus, the circuit court

correctly found that the district court abused its discretion in binding over defendant on this count.

The prosecution next contends that the district court abused its discretion in denying its request to bind over defendant on the OUIL causing death count. We disagree.

As acknowledged by the prosecutor, our Supreme Court has addressed the language of the OUIL causing death statute in *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996). The statute that was in effect at the time of the *Lardie* case provided the following:

> "A person, whether licensed or not, who operates a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state, under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance, or with a blood alcohol content of 0.10% or more by weight of alcohol, and by the operation of that motor vehicle causes the death of another person is guilty of a felony, punishable by imprisonment for not more than 15 years, or a fine of not less than $2,500.00 or more than $10,000.00, or both." [*Lardie*, supra at 238, quoting MCL 257.625(4), as adopted by 1991 PA 98.][1]

The *Lardie* Court found that under the above statute, the prosecutor must prove that the driver had the general intent to drive while intoxicated and that this wrongful act, i.e., the intoxicated driving, must be the cause of the death. *Lardie, supra*, 234. The Court stated that "[i]n seeking to reduce fatalities by deterring drunken driving, the statute must have been designed to punish drivers when their *drunken* driving caused another's death." *Id.* at 257 (emphasis in original, footnote omitted). "Otherwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death

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[1] We note that the OUIL statute has frequently been amended. MCL 257.625(4), as last amended by 2003 PA 61, effective July 15, 2003, provides in relevant part:

> A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1) [under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, or having an unlawful body alcohol content], (3) [visibly impaired by the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance], or (8) [any body content of a schedule 1 controlled substance] and by the operation of that motor vehicle causes the death of another person is guilty of a crime as follows: . . . . [penalties omitted.]

Even though the statute has been amended several times since the *Lardie* decision, the pertinent provisions remain substantially unchanged. Therefore, the Court's analysis in *Lardie* is applicable to the facts at hand.

that resulted." *Id.* The Court stated that such an interpretation would produce an absurd result by divorcing the defendant's fault from the resulting injury. *Id.* The Court continued:

> Moreover, this interpretation would not directly further the Legislature's purpose of reducing fatalities because there is no reason to penalize an intoxicated driver with a fifteen-year felony when there is an accident resulting in a fatality if that driver, even if not intoxicated, would still have been the cause in fact of the victim's death. There would be no reason because it would not prevent that fatality from occurring again. Therefore, in proving causation, the people must establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim. In this way, the statute does not impose a severe penalty when the injury was unavoidable for that particular driver (regardless of whether he was intoxicated), because the statute ensures that the wrongful decision caused the death in the accident. [*Id.* at 258 (footnotes omitted).]

Testimony at the preliminary examination revealed that defendant was driving under the influence of alcohol. But, as discussed above, testimony also revealed that defendant's intoxicated driving was not a substantial cause of the victim's death. The prosecution failed to present sufficient evidence to justify a finding that defendant's intoxicated driving was a substantial cause of the victim's death, as required in *Lardie.* Thus, the district court did not abuse its discretion in denying the prosecution's request to bind over defendant on this count.

The prosecutor argues that *Lardie* was wrongly decided and that subsequent case law casts doubt on *Lardie's* analysis; however, "[a] decision of the Supreme Court is binding upon this Court until the Supreme Court overrules itself." *O'Dess v Grand Trunk W R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996)(citations omitted). Therefore, we may not revisit the holding of *Lardie*. *Id.*

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell